

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

JOSE N. AVILA,

Case No. 2:24-cv-00690-EJY

Plaintiff,

V.

MARTIN O'MALLEY, Commissioner of  
Social Security,

Defendant.

## ORDER

Pending before the Court is Plaintiff's Brief seeking an order reversing the final decision of the Commissioner of Social Security (the "Commissioner" or "Defendant") and an award of benefits. ECF No. 11. The Court reviewed all briefing related to these Motions and finds as follows.

## I. Background

14 Plaintiff filed an application for Supplemental Security Income on September 21, 2017.  
15 Administrative Record (“AR”) 287-310. This application was denied by initial determination on  
16 December 20, 2017, and denied again, after reconsideration, on April 27, 2018. AR 226-29, 230-  
17 32, 233-38. Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”), which took  
18 place on February 14, 2020. AR 261-280, 111-152. The ALJ returned a decision that Plaintiff was  
19 not disabled on September 17, 2020. AR 85-103. Following a denial of review by the Appeals  
20 Council, Plaintiff filed a civil action resulting in remand for further proceedings. AR 2645-46. A  
21 second hearing was conducted on March 1, 2023 (AR 2546-2609), leading to an unfavorable  
22 decision, an appeal, declination of Plaintiff’s appeal, and this civil action. AR 2510-2540, 2752-  
23 2816, ECF No. 11.

## II. Standard of Review

25 The reviewing court shall affirm the Commissioner's decision if the decision is based on  
26 correct legal standards and the legal findings are supported by substantial evidence in the record. 42  
27 U.S.C. § 405(g); *Batson v. Comm'r Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004).  
28 Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable

1 mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401  
 2 (1971) (internal citation and quotation marks omitted). In reviewing the Commissioner’s alleged  
 3 errors, the Court must weigh “both the evidence that supports and detracts from the  
 4 [Commissioner’s] conclusions.” *Martinez v. Heckler*, 807 F.2d 771, 772 (9th Cir. 1986).

5 “When the evidence before the ALJ is subject to more than one rational interpretation, we  
 6 must defer to the ALJ’s conclusion.” *Batson*, 359 F.3d at 1198 (citing *Andrews v. Shalala*, 53 F.3d  
 7 1035, 1041 (9th Cir. 1995)). A reviewing court, however, “cannot affirm the decision of an agency  
 8 on a ground that the agency did not invoke in making its decision.” *Stout v. Comm’r Soc. Sec.  
 9 Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006) (internal citation omitted). Finally, the court may not  
 10 reverse an ALJ’s decision on account of an error that is harmless. *Burch v. Barnhart*, 400 F.3d 676,  
 11 679 (9th Cir. 2005) (internal citation omitted). “[T]he burden of showing that an error is harmful  
 12 normally falls upon the party attacking the agency’s determination.” *Shinseki v. Sanders*, 556 U.S.  
 13 396, 409 (2009).

14 **III. Discussion**

15 To establish whether a claimant is disabled under the Act, there must be substantial evidence  
 16 that:

- 17 (a) the claimant suffers from a medically determinable physical or mental  
     impairment that can be expected to result in death or that has lasted or can be  
     expected to last for a continuous period of not less than twelve months; and
- 19 (b) the impairment renders the claimant incapable of performing the work that  
     the claimant previously performed and incapable of performing any other  
     substantial gainful employment that exists in the national economy.

21 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999), citing 42 U.S.C. § 423(d)(2)(A). “If a claimant  
 22 meets both requirements, he or she is disabled.” *Id.*

23 The ALJ employs a five-step sequential evaluation process to determine whether a claimant  
 24 is disabled within the meaning of the Act. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987); 20 C.F.R.  
 25 § 404.1520(a). Each step is potentially dispositive and “if a claimant is found to be ‘disabled’ or  
 26 ‘not-disabled’ at any step in the sequence, there is no need to consider subsequent steps.” *Tackett*,  
 27 180 F.3d at 1098; 20 C.F.R. § 404.1520. The claimant carries the burden of proof at steps one  
 28

1 through four, and the Commissioner carries the burden of proof at step five. *Tackett*, 180 F.3d at  
 2 1098.

3 The five steps are:

4 Step 1. Is the claimant presently working in a substantially gainful activity? If so,  
 5 then the claimant is “not disabled” within the meaning of the Social Security Act  
 6 and is not entitled to disability insurance benefits. If the claimant is not working in  
 7 a substantially gainful activity, then the claimant’s case cannot be resolved at step  
 8 one and the evaluation proceeds to step two. *See* 20 C.F.R. § 404.1520(b).

9 Step 2. Is the claimant’s impairment severe? If not, then the claimant is “not  
 10 disabled” and is not entitled to disability insurance benefits. If the claimant’s  
 11 impairment is severe, then the claimant’s case cannot be resolved at step two and  
 12 the evaluation proceeds to step three. *See* 20 C.F.R. § 404.1520(c).

13 Step 3. Does the impairment “meet or equal” one of a list of specific impairments  
 14 described in the regulations? If so, the claimant is “disabled” and therefore entitled  
 15 to disability insurance benefits. If the claimant’s impairment neither meets nor  
 16 equals one of the impairments listed in the regulations, then the claimant’s case  
 17 cannot be resolved at step three and the evaluation proceeds to step four. *See* 20  
 18 C.F.R. § 404.1520(d).

19 Step 4. Is the claimant able to do any work that he or she has done in the past? If  
 20 so, then the claimant is “not disabled” and is not entitled to disability insurance  
 21 benefits. If the claimant cannot do any work he or she did in the past, then the  
 22 claimant’s case cannot be resolved at step four and the evaluation proceeds to the  
 23 fifth and final step. *See* 20 C.F.R. § 404.1520(e).

24 Step 5. Is the claimant able to do any other work? If not, then the claimant is  
 25 “disabled” and therefore entitled to disability insurance benefits. *See* 20 C.F.R. §  
 26 404.1520(f)(1). If the claimant is able to do other work, then the Commissioner  
 27 must establish that there are a significant number of jobs in the national economy  
 28 that claimant can do. There are two ways for the Commissioner to meet the burden  
 of showing that there is other work in “significant numbers” in the national economy  
 that claimant can do: (1) by the testimony of a vocational expert [(“VE”)], or  
 (2) by reference to the Medical-Vocational Guidelines at 20 C.F.R. pt. 404,  
 subpt. P, app. 2. If the Commissioner meets this burden, the claimant is “not  
 disabled” and therefore not entitled to disability insurance benefits. *See* 20 C.F.R.  
 §§ 404.1520(f), 404.1562. If the Commissioner cannot meet this burden, then the  
 claimant is “disabled” and therefore entitled to disability benefits. *See id.*

29 *Id.* at 1098-99 (internal alterations omitted).

30 A. Summary of ALJ’s Findings.

31 There is no dispute that the ALJ followed the five step sequential process when deciding  
 32 whether Plaintiff is disabled under the Social Security Act (sometimes the “Act”). The ALJ found  
 33 Plaintiff satisfied step one of the process when she determined Plaintiff had not engaged in  
 34 substantial gainful activity since September 21, 2017. AR 2515. At step two, the ALJ found Plaintiff

1 has severe impairments including “cervical spine degenerative disc disease, hip osteoarthritis with  
 2 history of replacement, osteomyelitis left foot, and chronic obstructive pulmonary disease  
 3 (‘COPD’).” *Id.* The ALJ also found Plaintiff suffered from non-severe impairments including “left  
 4 lung atelectasis, stage IV kidney disease, lymphopenia, hyperbilirubinemia, osteopenia,  
 5 hypertension, URI, *obesity*, cellulitis, diabetes mellitus with polyneuropathy, leg ulcer, headache,  
 6 atherosclerosis, gastrointestinal issues, and hallux valgus deformity.” AR 2516 (emphasis added).  
 7 At step three the ALJ found Plaintiff’s impairments, individually and in combination, did not meet  
 8 or medically equal the severity of one of the listed impairments under 20 CFR Part 404, subpart P,  
 9 Appendix 1 (20 CFR 416.920(d), 416.825 and 416.926) of the Act. AR 2519.

10 In preparation for step four of the sequential process, the ALJ found Plaintiff has the residual  
 11 functional capacity (“RFC”) as follows:

12 to perform light work as defined in 20 CFR 416.967(b) except lifting and/or  
 13 carrying 20 pounds occasionally and 10 pounds frequently; standing for 6 hours,  
 14 walking for 6 hours; and push/pull as much as can lift/carry.[] He can operate foot  
 15 controls with left foot frequently. The claimant can frequently reach overhead to  
 16 the left, and frequently reach overhead to the right. For all other reaching he can  
 17 reach frequently to the left and can reach frequently to the right. The claimant can  
 18 climb ramps and stairs occasionally, climb ladders occasionally, but no ropes or  
 19 scaffolds. The claimant can stoop occasionally, kneel occasionally, crouch  
 20 occasionally, crawl occasionally. The claimant can never work at unprotected  
 21 heights, can work around moving mechanical parts occasionally, and operate a  
 22 motor vehicle occasionally. The claimant can work in humidity and wetness  
 23 frequently, in dust, odors, fumes and pulmonary irritants occasionally. The  
 24 claimant can be in extreme cold occasionally, in extreme heat occasionally, and in  
 25 vibration occasionally.

26 AR 2520-21. In a footnote, the ALJ added Plaintiff can be on his feet no more than six hours in an  
 27 eight hour day. AR 2520 n.2. The ALJ stated she considered all of Plaintiff’s “symptoms and the  
 28 extent to which these symptoms … [could] reasonably be accepted as consistent with the objective  
 medical evidence and other evidence ....” AR 2521. The ALJ “also considered the medical  
 opinion(s) and prior administrative medical finding(s) ....” *Id.*

29 At step four the ALJ found Plaintiff was unable to perform any past relevant work; Plaintiff  
 30 had at least a high school diploma; and was 49 years old at the time of his application (an age defined  
 31 as a younger individual), but “subsequently changed age category to closely approaching advanced  
 32 age.” AR 2528. The ALJ found Plaintiff had no material transferable skills, but considering his age,

1 education, work experience, and RFC, there were jobs in significant numbers in the national  
2 economy Plaintiff could perform. AR 2528, 2530. The ALJ discussed the Medical-Vocational  
3 Guidelines (20 CFR Part 404, subpart P, Appendix 2) and the testimony of the Vocational Expert  
4 (“VE”). AR 2530. At step five, the ALJ found, based on Plaintiff’s RFC, age, education, and work  
5 experience, “in conjunction with the Medical-Vocational Guidelines,” that Plaintiff’s ability to  
6 perform the full range of light work was “impeded by additional limitations”; however, based on the  
7 VE’s testimony, Plaintiff would be able to perform the requirements of representative unskilled,  
8 light exertional work such as cashier II, price marker, office helper, and mail clerk. AR 2530. On  
9 this basis, the ALJ concluded Plaintiff was not disabled. AR 2529.

10 || B. Summary of Plaintiff's Arguments and Defendant's Response.

11 Plaintiff raises two primary issues in his brief seeking reversal and payment of benefits. First,  
12 Plaintiff claims the ALJ's RFC determination lacks support of substantial evidence. ECF No. 11 at  
13 5. Plaintiff takes particular issue with the determination that he can stand and walk for six hours in  
14 an eight hour day. *Id.* at 6. Plaintiff recounts the finding of a consultive examination from 2017,  
15 and medical opinions from 2020, 2022, and 2023 all of which found he could sit and or walk for two  
16 or less hours each day. *Id.* at 6-7. Plaintiff returns to this theme after complaining the ALJ ignored  
17 his obesity, which he contends is a severe impairment (*id.* at 8), stating longitudinal records show  
18 obese people like Plaintiff cannot be on their feet for six hours of an eight hour day. *Id.* at 9. Plaintiff  
19 then says the ALJ's RFC conclusion cannot be upheld because the ALJ did not explain how she  
20 arrived at her sitting and walking limitations as these findings are "untethered to any medical  
21 opinion." *Id.* at 9-10. Raising one more issue, Plaintiff says the ALJ had a duty to develop the  
22 record and, "[i]n light of the ALJ's perception of an evidentiary gap between the medical evidence  
23 and opinions of record, the ALJ should have reconciled the discrepancy." *Id.* at 10. Plaintiff says  
24 none of these errors are harmless because the VE testified that even if Plaintiff was limited to  
25 standing and walking two hours a day he could still perform each of the occupations identified. *Id.*  
26 at 11-12.

27 Plaintiff's second argument avers the ALJ did not articulate clear and convincing reasons for  
28 discounting Plaintiff's symptom and limitations testimony. *Id* at 13. According to Plaintiff, the

1 ALJ's reliance on Plaintiff's daily activities is error as these activities are not transferable to an  
 2 ability to work. *Id.* at 15. Plaintiff further says the ALJ's determination that there was a lack of  
 3 objective findings to support Plaintiff's testimony is error because the absence of objective medical  
 4 evidence cannot be the sole basis for discounting pain testimony, while it is a factor when assessing  
 5 Plaintiff's credibility. AR 15-16.

6 The Commissioner focuses on step two of the sequential process arguing the ALJ found  
 7 Plaintiff suffered from a range of severe impairment; although obesity is not one of them. ECF No.  
 8 13 at 3. The Commissioner says step two is a "threshold determination" intended to screen out weak  
 9 claims and not the step at which "impairments that should be taken into account when determining"  
 10 a claimant's RFC because the RFC "should be exactly the same regardless of whether certain  
 11 impairments are considered severe or not." *Id.* (internal citation omitted). The Commissioner says  
 12 the problem here is that while obesity may cause limitations in standing and walking, Plaintiff  
 13 offered no evidence that his obesity limited either function. *Id.*

14 The Commissioner turns to Plaintiff's arguments regarding his self reported limitations,  
 15 discussing several medical reports dated in 2009, 2018, and 2019, and arguing these reports support  
 16 the ALJ's finding that Plaintiff's limitations were not as he claimed. *Id.* at 5. With respect to  
 17 Plaintiff's daily activities, the Commissioner says only that Plaintiff admitted to working as recently  
 18 as 2019. *Id.* at 5-6.

19 The Commissioner turns back to the RFC finding arguing Plaintiff asks the Court to reweigh  
 20 evidence when ample evidence supported the ALJ's conclusions. *Id.* at 7. Finally, the  
 21 Commissioner argues there is no evidentiary gap and the ALJ must "develop the record further only  
 22 when the evidence is ambiguous or otherwise inadequate," which is not the case here. *Id.* at 8.

23 In reply, Plaintiff argues the ALJ who heard Plaintiff's case during the first round of  
 24 proceeding found obesity was a severe impairment and that Plaintiff is still obese. ECF No. 14 at 3.  
 25 Plaintiff argues that the ALJ's determination in 2023 fails to offer any reasonable explanation for  
 26 the elimination of obesity as significantly limiting Plaintiff's ability to work. *Id.* at 3-4. Plaintiff  
 27 also reiterates that the ALJ asserts her own medical opinions to support her RFC. *Id.* at 6-7.

1 Plaintiff further argues that his ability to perform activities of daily living do not undermine  
 2 his symptom testimony because he does not have to be a “basket case” in order to qualify for benefits.  
 3 *Id.* at 4. Plaintiff corrects the record demonstrating that he denied working in 2019, and any  
 4 representation to the contrary is mistaken—a proposition with which the Court agrees. AR 2569-  
 5 71. Plaintiff points to the Commissioner’s argument that “Plaintiff frequently failed to follow up on  
 6 treatment recommendations ....” ECF No. 13 at 6 *citing* AR 2525. A review of AR 2525 does not  
 7 state Plaintiff failed to follow up for treatment. This portion of the ALJ’s decision states Plaintiff’s  
 8 allegations that treatment has been ineffective is belied by the record showing improved left foot  
 9 symptoms, a lack of treatment for disc disease or hip arthritis, part of which demonstrates that he  
 10 continues to smoke despite a diagnosis of COPD. *Id.*

11       C.     The Residual Functional Capacity.

12       “Ordinarily, RFC is an assessment of an individual’s ability to do sustained work-related  
 13 physical and mental activities in a work setting on a regular and continuing basis. A ‘regular and  
 14 continuing basis’ means 8 hours a day, for 5 days a week, or an equivalent work schedule. ... [An]  
 15 RFC is not the *least* an individual can do despite his or her limitations or restrictions, but the *most*.”  
 16 SSR 96-8P (S.S.A.), 1996 WL 374184, at \*1 (emphasis in original). Further, “while it is the  
 17 responsibility of the ALJ, not the claimant’s physician, to determine residual functional capacity ...,  
 18 it does not follow that the ALJ can substitute his own interpretations of medical records and data for  
 19 medical opinions.” *Mack v. Saul*, Case No. 1:18-cv-01287-DAD-BAM, 2020 WL 2731032, at \*2  
 20 (E.D. Cal. May 26, 2020) (internal citation and quote marks omitted).

21       Here, Plaintiff complains that the RFC is erroneous because numerous health care  
 22 professionals found he could not stand or walk for more than 2 hours in an 8 hour day—including  
 23 Drs. Lagstein in 2017, Paz in 2020, Truman in 2022, and Valdez in 2023—while the ALJ concluded  
 24 Plaintiff could stand and walk for six hours in an eight hour day. *Compare* AR 2520 n.2 with AR  
 25 2526-27. The ALJ found each of the medical opinions not persuasive because Plaintiff often  
 26 presented with a normal gait. *See* AR 2526 paragraphs discussing the consultive examiner and Dr.  
 27 Paz; AR 2527 paragraphs discussing Dr. Valdez and the state agency medical consultant.

1           The Court finds the ALJ never explains why Plaintiff's gait demonstrates an ability to stand  
 2 and walk for six hours a day especially given the absence of any discussion regarding the impact of  
 3 Plaintiff's obesity, even as a non-severe condition. *Id.* The Court further finds that given the  
 4 consistency of the medical opinions over many years regarding Plaintiff's standing and walking  
 5 limitation and the ALJ's rejection of all of these opinions, the ALJ's conclusion—solely appearing  
 6 in a footnote (at AR 2520) stating: "No more than six hours on one's feet in an eight-hour day"—is  
 7 not supported by substantial evidence.<sup>1</sup>

8           Separately, the Court notes Plaintiff argues that the VE's testimony regarding jobs Plaintiff  
 9 can perform is inconsistent with Department of Labor data. ECF No. 11 at 11-12. The  
 10 Commissioner does not respond to this argument and he therefore forfeits an opposition. *See*  
 11 *Latahotchee v. Comm'r of Soc. Sec. Admin.*, Case No. CV-19-05668-PHX-DWL, 2021 WL 267909,  
 12 at \*4 (D. Ariz. Jan. 27, 2021) ("Defendant does not bother to address Plaintiff's argument....  
 13 Defendant therefore concedes the correctness of Plaintiff's argument on that point"), *compare* ECF  
 14 No. 13, generally.

15           Based on the foregoing, the Court finds the ALJ's RFC determination is not supported by  
 16 substantial evidence and this matter is remanded for further proceedings on this issue.

17           D. Plaintiff's Testimony.

18           The ALJ must engage in a two-step analysis when evaluating a plaintiff's testimony  
 19 concerning pain, symptoms, and level of limitation is credible. *Garrison v. Colvin*, 759 F.3d 995,  
 20 1014 (9th Cir. 2014). First, "the ALJ must determine whether the claimant has presented objective  
 21 medical evidence of an underlying impairment 'which could reasonably be expected to produce the  
 22 pain or other symptoms alleged.'" *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)  
 23 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). Second, if there is no  
 24 evidence of malingering, "the ALJ can reject the claimant's testimony about the severity of ... [his]  
 25 symptoms only by offering specific, clear and convincing reasons for doing so." *Garrison*, 759 F.3d

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 27           <sup>1</sup> The Court notes this is not, as the Commissioner argues, a step two error regarding findings of severe and non-  
 28 severe ailments, but a fundamental failure to support the ALJ's RFC finding with substantial evidence. The Court finds  
 that while the ALJ failed to consider Plaintiff's obesity, there was no error in concluding obesity a non-severe  
 impairment. The Court further concludes no evidentiary gap in the medical evidence.

1 at 1014-15 (internal citation omitted). An ALJ's finding on this matter must be properly supported  
 2 by the record and sufficiently specific to demonstrate to a reviewing court that the ALJ did not  
 3 "arbitrarily discredit" a claimant's subjective testimony. *Thomas v. Barnhart*, 278 F.3d 948, 958  
 4 (9th Cir. 2002) (citation omitted). A plaintiff's statement about his pain or other symptoms alone  
 5 will not establish that he is disabled. 20 C.F.R. § 416.929(a)(1); 42 U.S.C. § 423(d)(5)(A) ("An  
 6 individual's statement as to pain or other symptoms shall not alone be conclusive evidence of  
 7 disability."). A plaintiff is not entitled to benefits under the Social Security Act unless the plaintiff  
 8 is, in fact, disabled, no matter how egregious the ALJ's errors may be. *Strauss v. Comm'r Soc. Sec.*  
 9 *Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011).

10 Here, the ALJ found Plaintiff's "medically determinable impairments could reasonably be  
 11 expected to cause the alleged symptoms; however, the claimant's statements concerning the  
 12 intensity, persistence and limiting effects of these symptoms are not entirely consistent with the  
 13 medical evidence and other evidence in the record ...." AR 2521. The ALJ identified Plaintiff's  
 14 specific testimony regarding his pain and limitations<sup>2</sup> (*id*) and then walked through medical evidence  
 15 she found undermined each of Plaintiff's statements. AR 2522-24. The ALJ also discussed  
 16 Plaintiff's daily activities citing his ability to "grocery shop, use public transportation, and prepare  
 17 meals" finding "[t]hese activities indicate a higher degree of functioning and ability to concentrate  
 18 than [Plaintiff] alleged." AR 2524. The ALJ discussed other factors considered including Plaintiff's  
 19 written statements and functions reports, and Plaintiff's wife's Third Party Function Report. AR  
 20 2521-2525.

21 The ALJ provided a "sufficiently specific [discussion] to permit the [C]ourt to conclude that  
 22 the ALJ did not 'arbitrarily discredit'" Plaintiff's testimony. *Bunnell*, 947 F.2d at 345 (internal  
 23 citation omitted). The ALJ's discussion in this portion of her decision is clear enough to convince  
 24 the Court that her reasoning is supported by clear and convincing evidence. While the evidence  
 25 before the ALJ regarding Plaintiff's subjective complaints "may have been subject to more than one

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 27       <sup>2</sup> The ALJ stated: Plaintiff stated "he had ulcers in his left foot[;] ... he has COPD and treats it with a nebulizer[;]  
 28 ... he has constant pain in his hip[;] ... he has an inflatable custom boot and it makes his hip hurt[;] ... he has to elevate  
 his feet because his feet swell[;] ... he cannot lift objects with his left arm[;] ... he uses a cane and walker consistently[;]  
 and] ... he ... [has] difficulty with lifting, squatting, bending, standing, reaching, walking, sitting, kneeling, using his  
 hands, remembering, completing tasks, concentrating, and getting along with others ...." AR 2521.

1 rational interpretation,” the Court must defer to the ALJ’s conclusion regarding Plaintiff’s subjective  
2 complaint testimony. *Batson*, 359 F.3d at 1198, *citing Andrews*, 53 F.3d at 1041.

3 **IV. Order**

4 IT IS HEREBY ORDERED that Plaintiff’s Brief (ECF No. 11) seeking an order reversing  
5 the final decision of the Commissioner is GRANTED in part and DENIED in part.

6 IT IS FURTHER ORDERED that this matter is remanded for further administrative  
7 proceedings concerning the ALJ’s residual functional capacity finding consistent with this Order  
8 pursuant to sentence four of 42 U.S.C. 405(g).

9 IT IS FURTHER ORDERED that except as stated above, Plaintiff’s Brief is DENIED.

10 IT IS FURTHER ORDERED that the Clerk of Court must close this case and enter judgment  
11 accordingly.

12 DATED this 14th day of April, 2024.

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15 ELAYNA J. YOUCRAH  
16 UNITED STATES MAGISTRATE JUDGE  
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